

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

VICTOR M. NORIEGA,

Plaintiff,

vs.

JOHN PERRY and RAFAEL
GONZALES,

Defendants.

NO. CV-11-125-CI

ORDER ADOPTING REPORT AND
RECOMMENDATION AND
DISMISSING COMPLAINT

1915(g)

Magistrate Judge Imbrogno filed a Report and Recommendation on August 30, 2011, recommending Mr. Noriega's civil rights complaint be dismissed with prejudice for failure to state a claim upon which relief may be granted. In his complaint, Plaintiff had sought the dismissal of his criminal charges, claiming the ineffective assistance of counsel. His only federal remedy for challenging a conviction or his confinement is a writ of habeas corpus. *See Preiser v. Rodriguez*, 411 U.S. 475, 487-90 (1973); *Heck v. Humphrey*, 512 U.S. 477, 481 (1994).

Mr. Noriega presented no facts showing the named Defendants, a public defender and his supervisor, were persons acting under color of state law for purposes of 42 U.S.C. § 1983. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), *holding limited on other grounds by West v. Atkins*, 487 U.S. 42 (1988). Plaintiff failed to amend his complaint to state a claim upon which relief may be granted.

A copy of the Report and Recommendation, ECF No. 10, was sent to Mr. Noriega

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1 at the Washington Correction Center, based on information provided by the Jail Financial
2 Specialist at the Grant County Jail. ECF No. 9. It was returned as undeliverable. ECF
3 No. 11. Plaintiff has failed to keep the court apprised of his present address.

4 There being no objections, the court **ADOPTS** the Report and Recommendation.
5 The Complaint is **DISMISSED WITH PREJUDICE** for failure to state a claim upon
6 which relief may be granted under 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1), but without
7 prejudice to pursuing appropriate state court and federal habeas proceedings.

8 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who brings
9 three or more civil actions or appeals which are dismissed as frivolous or for failure to
10 state a claim will be precluded from bringing any other civil action or appeal *in forma*
11 *pauperis* “unless the prisoner is under imminent danger of serious physical injury.” 28
12 U.S.C. § 1915(g). **Plaintiff is advised to read the new statutory provisions under 28**
13 **U.S.C. § 1915. This dismissal of Plaintiff's complaint may count as one of the three**
14 **dismissals allowed by 28 U.S.C. § 1915(g) and may adversely affect his ability to file**
15 **future claims.**

16 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
17 Order, enter judgment, forward copies to Plaintiff at his last known address, and close the
18 file. The District Court Executive is further directed to forward a copy of this Order to
19 the Office of the Attorney General of Washington, Criminal Justice Division. The court
20 certifies any appeal of this dismissal would not be taken in good faith.

21 **DATED** this 7th day of October 2011.

22
23 s/Robert H. Whaley
24 **ROBERT H. WHALEY**
25 **UNITED STATES DISTRICT JUDGE**
26